

JESSICA BRIGGS
(Appellant)

v.

H & K STEVENS, INC.
(Appellee)

and

CONTINENTAL CASUALTY CO.
(Insurer)

Conference held: November 20, 2013
Decided: August 12, 2014

PANEL MEMBERS: Hearing Officers: Knopf, Goodnough, and Stovall
BY: Hearing Officer Stovall

[¶1] Jessica Briggs appeals from a decision of a Workers' Compensation Board hearing officer (*Greene, HO*) denying her Petitions for Award and for Payment of Medical and Related Services. Ms. Briggs has a preexisting foot condition that she contends was aggravated by her employment activities, which included prolonged periods of standing on a hard surface. On appeal, Ms. Briggs asserts that the hearing officer erred when determining that Ms. Briggs did not establish (1) that she suffered a work-related injury because she did not establish legal causation; and (2) even if she did suffer a work-related injury, that her employment contributed to her disability in a significant manner pursuant to 39-A M.R.S.A. § 201(4) (2001). We vacate the hearing officer's decision.

I. BACKGROUND

[¶2] The hearing officer found the following facts, which are supported in the record: Jessica Briggs began working at a Subway franchise owned by H & K Stevens, Inc., in 2000, and eventually became the on-site manager. She worked forty or more hours per week, in shifts lasting eight to twelve hours. She spent most of her work shifts standing or walking, whether overseeing the franchise's operation, training employees, or making sandwiches. She often stood during her meal breaks. The floor surface in the area where Ms. Briggs worked was laminate composite tile over cement, although there was a rubber mat in front of the sink. Ms. Briggs estimated that she spent 90% of her time at work standing or walking on those floors. She wore sneakers while working.

[¶3] Ms. Briggs first sought medical treatment for pain and weakness in her right foot and ankle in July 2010, which she reported had started about nine months earlier and had become gradually worse. The doctor who treated her noted that Ms. Briggs suffered from an underlying condition, pes planus (flat feet), which caused her to develop tarsal sinus syndrome. The doctor prescribed narcotic pain medication and instructed Ms. Briggs to wear a non-pneumatic walking boot. The doctor also recommended that she see a podiatrist.

[¶4] Ms. Briggs continued to work while wearing the boot. H & K Stevens allowed her to spend time off her feet with her right foot elevated. When on her

feet, she worked more often at the cash register rather than on the sandwich line in order to limit her movement.

[¶5] Ms. Briggs saw a podiatrist in August 2010 who thought she might have a posterior tibial tendon rupture or an ossification or calcification of the tendon due to inflammation. The podiatrist recommended that she see a foot surgeon due to her flat foot condition.

[¶6] Ms. Briggs underwent surgery on February 1, 2011, during which the orthopaedic surgeon, Dr. Wexler, detached the posterior tibial tendon, removed an accessory ossicle, and reattached the posterior tibial tendon with a tenodesis screw. In the months following her surgery, Ms. Briggs continued to treat with various medical practitioners for persistent pain and swelling in her right foot and ankle.

[¶7] Ms. Briggs worked at Subway until the day before her surgery, at which time H & K Stevens laid her off. Because she continued to experience pain and limitations in her right foot and ankle after the surgery and could not perform her job duties, H & K Stevens terminated her employment in May 2011.

[¶8] Ms. Briggs filed Petitions for Award and for Payment of Medical and Related Services. Due to her preexisting foot condition, the hearing officer applied 39-A M.R.S.A. § 201(4) (2001). The hearing officer initially assumed that Ms. Briggs suffered a work-related aggravation injury on or about June 18, 2010, and concluded that Ms. Briggs did not establish that her employment contributed to her

disability in a significant manner. Pursuant to a motion for additional findings of fact and conclusions of law, the hearing officer further ruled that Ms. Briggs did not establish that she suffered a work injury, reasoning that the evidence did not persuade him that her work activity caused her increased symptoms.¹ Ms. Briggs appeals from the hearing officer's decision as modified by the additional findings and conclusions.

II. DISCUSSION

A. Standard of Review

[¶9] The Appellate Division's role on appeal is limited to assuring that the hearing officer's factual findings are supported by competent evidence, that the decision involved no misconception of applicable law, and that the application of the law to the facts was neither arbitrary nor without rational foundation. *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983). When a party requests and proposes additional findings of fact and conclusions of law, as in this case, "we review only the factual findings actually made and the legal standards actually applied by the hearing officer." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

¹ H & K Stevens asserted a notice defense pursuant to 39-A M.R.S.A. § 301. Because the hearing officer determined that the injury was not compensable pursuant to section 201(4), he did not reach the notice issue.

B. Legal Causation

[¶10] Ms. Briggs contends that the hearing officer misapplied the law to the facts when determining that her foot and ankle condition did not arise out of and in the course of her employment. She specifically argues that the hearing officer erred by relying exclusively on medical evidence to determine that her work activity was not the legal cause of the injury.

[¶11] Because this case involves an alleged work injury combined with a preexisting medical condition, liability is ultimately determined pursuant to 39-A M.R.S.A. § 201(4). *McAdam v. United Parcel Serv.*, 2001 ME 4, ¶ 11, 763 A.2d 1173. Section 201(4) states:

If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

39-A M.R.S.A. § 201(4). “When a case appears to come within section 201(4), the hearing officer must first determine whether the employee has suffered a work-related injury . . . then [section] 201(4) is applied if the employee has a condition that preceded the injury.”² *Celentano v. Dep’t of Corr.*, 2005 ME 125, ¶ 9, 887

² Ms. Briggs initially argues that the hearing officer erred because he decided the case based on the section 201(4) significant contribution by the employment standard, without first determining whether a work injury occurred. *See Derrig v. Fels Co.*, 1999 ME 162, ¶ 8, 747 A.2d 580. To the extent this may constitute an error, the hearing officer corrected it in the findings of fact and conclusions of law, when he concluded that Ms. Briggs did not meet her burden to establish that the exacerbation of her foot condition was caused by the employment.

A.2d 512 (quotation marks omitted). “This analysis is utilized whether the injury is the result of a single event or whether the injury is a gradual one.” *Derrig v. Fels Co.*, 1999 ME 162, ¶ 6, 747 A.2d 580.

[¶12] Ms. Briggs asserts that the facts demonstrate that she suffered a gradual work injury that combined with, aggravated, or accelerated her preexisting foot condition. “In a combined effects case, the ‘arising out of and in the course of employment’ requirement is satisfied by showing both medical and legal cause.” *Bryant v. Masters Mach. Co.*, 444 A.2d 329, 336 (Me. 1982).³ To establish legal causation when “the employee bears with [her] some ‘personal’ element of risk because of a pre-existing condition, the employment must be shown to contribute some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment.” *Id.* at 337.

[¶13] The comparison of the employment to personal risk is made against an objective standard; thus, a hearing officer should compare the risk that arises out of the conditions of employment and the risk present in an average person’s non-employment life. *Id.* The element of legal causation distinguishes “situations in which the employee just happened to be at work when the disability arose from those where the disability occurred only because an employment condition

³ Medical causation is not at issue in this case.

increased the risk of disability above the risks that the employee faced in everyday life.” *Celentano*, 2005 ME 125, ¶ 12, 887 A.2d at 515.

[¶14] The hearing officer in his additional findings of fact and conclusions of law determined that Ms. Briggs did not meet her burden of proving the occurrence of a work-related injury. The hearing officer stated that “the employee has presented no persuasive evidence that the deterioration in her condition or her need for surgery was accelerated by the impact of her work activities on that condition.” He reasoned:

[T]he Board is not persuaded that the mere fact that the employee’s work activities “more likely than not, contributed to her chronic right foot pain,” as opined by Dr. [Nesin], or that “during the process of daily life activities and work requiring a lot of standing and walking, she [has] experienced an inflammation of the posterior tibial tendon in her right foot,” as opined by Dr. Kimball, demonstrates that the employee’s disability “occur[ed] only because some condition of [her] employment increase[d] the risk that [she would] sustain a disability above that level of risk which, because of [her] condition, [she] face[d] in [her] normal everyday life . . . thus offsetting the personal risk the employee [brought] to the employment environment.”

[¶15] Thus, the hearing officer determined that even though Ms. Briggs established that her work activity contributed to her foot condition, she did not establish that her symptoms arose because of any increased risk peculiar to her work.

[¶16] Ms. Briggs argues that the hearing officer misapplied the law when using medical evidence exclusively to assess legal causation. She asserts that the

hearing officer should have looked at the conditions of employment and determined whether those conditions put her at greater risk of injury than did the risks of an ordinary person's everyday non-work life. She contends that the hearing officer's factual findings that her work duties involved standing for prolonged periods on a composite over concrete surface for work were sufficient to establish that she was at greater risk of her particular injury than would arise in an ordinary person's everyday non-work life. We agree.

[¶17] In *Bryant*, the employee was operating a drill press while sitting on a stool, when another employee accidentally kicked the stool out from under him. *Bryant*, 444 A.2d at 331. The fall triggered symptoms of a previously asymptomatic back condition. *Id.* at 333. The Law Court reversed and remanded the decision denying compensation, determining that the injury was compensable because the conditions of employment—performing work while sitting on a stool while other employees moved around in the environment—increased the risk that the employee would fall. *Id.* at 342-43. *See also Celentano*, 2005 ME 125, ¶ 14, 887 A.2d 512 (affirming determination that legal cause had been established when employee's trip over a table leg lit up a preexisting asymptomatic knee condition based on description of the table leg and the fact that another employee had tripped over the table leg).

[¶18] In contrast, in *Barrett v. Herbert Eng'g, Inc.*, 371 A.2d 633, 636 (1977), the employee, who had a long history of intermittent back discomfort, suddenly experienced severe low back pain at work while merely walking at a normal gait. The Commission determined that the injury was not compensable because it was not caused by any condition of employment. *Id.* at 635. The Law Court affirmed, reasoning that the record supported the finding that the employee's "lumbo-sacral strain did not spring into activity by reason of any work that he was doing, but occurred while he was walking at his normal gait." *Id.* at 636.

[¶19] We conclude, based on the facts as found, that the hearing officer misapplied the law when determining that the conditions of Ms. Briggs's employment did not elevate the risk of the injury she suffered above the risk present in an average person's non-working life. Although arguably present in this record, expert medical evidence is not always necessary to establish that conditions of employment increase the risk of injury. We can say, objectively, that an average person in their ordinary life does not stand or walk on a hard surface for 90% of an eight to twelve hour shift while working full-time for over a ten-year period. The hearing officer observed, based on Dr. Kimball's opinion, that it is not uncommon that this type of stress will exacerbate the type of foot injury Ms. Briggs suffered. Because these conditions of her work exposed Ms. Briggs to a risk of injury over

and above that experienced in an average person's everyday life, they constitute a legal cause of the injury.

C. Significant Contribution to Employment—Application of 39-A M.R.S.A. § 201(4)

[¶20] Having concluded that Ms. Briggs's injury arose out of and in the course of employment, we address the second aspect of the inquiry—whether the hearing officer erred when determining that the employment did not contribute to Ms. Briggs's disability in a significant manner. *See Celentano*, 2005 ME 125, ¶ 9, 887 A.2d 512.

[¶21] While acknowledging that there is medical opinion evidence establishing that the employee's work activities more likely than not contributed to her chronic right foot pain, the hearing officer nevertheless found no significant employment contribution because the medical opinion evidence (1) did “not address the significance of [the] contribution in view of the preexisting congenital conditions,” (2) did not establish that Ms. Briggs's foot surgery was necessitated by the employee's work activities, and (3) did not “apportion the relative contributions of the employee's ‘daily life activities’ or her ‘work’ to her increasingly disabling symptoms.”

[¶22] This level of analysis is not required by the law. For example, in *Celentano*, the Law Court affirmed a hearing officer decision that an employee's preexisting condition was contributed to by the employment in a significant

manner when the employee merely tripped over a table leg when getting up from a table. The Court reasoned that the combination of the work injury and the preexisting condition resulted in the employee's no longer being able to perform his work duties or engage in athletic activities he previously enjoyed; thus he had been rendered disabled. *Id.* ¶ 17. The Court further considered the act of getting up from the table to be part of the work activity and, although “the incident itself may have been trivial, it nevertheless constitute[d] employment activity” that contributed to the employee's disability in a manner sufficient to satisfy section 201(4). *Id.* ¶ 18.

[¶23] Although *Celentano* may be distinguishable because it involved an acute incident that triggered the employee's dormant symptoms, its reasoning is nevertheless applicable in a case involving a gradual aggravation injury. Here, the combination of the preexisting condition and the gradual aggravation of that condition at work resulted in Ms. Briggs's no longer being able to perform her work duties for H & K Stevens. Thus, it rendered her disabled. *See id.* at ¶ 17. Moreover, the act of standing or walking on a hard surface for prolonged periods was part of her work activity, and it contributed to her disability. Consistent with *Celentano*, it did so in a manner sufficient to satisfy section 201(4). *See id.* at 18.

III. CONCLUSION

[¶24] Considering only the factual findings made by the hearing officer, and applying the law to those findings, we conclude that the hearing officer erred when determining that Ms. Briggs's employment was not a legal cause of her injury, and that the injury was not compensable pursuant to 39-A M.R.S.A. § 201(4). However, because the hearing officer did not resolve the issue of whether Ms. Briggs provided adequate notice pursuant to 39-A M.R.S.A. § 301, we remand the case for further proceedings focused on that issue.

The entry is:

The hearing officer's decision is vacated and the case is remanded for additional proceedings consistent with this decision.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

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